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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. IVAN FONSECA, Defendant and Appellant.	B215988 (Los Angeles County Super. Ct. No. TA103598)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kevin L. Brown, Judge. Reversed and remanded with directions.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jamie L. Fuster and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Following the denial of a motion to suppress evidence, Appellant Ivan Fonseca (Fonseca) pled no contest to possession of a concealed firearm in violation of Penal Code section 12025, subdivision (a)(1). On appeal, Fonseca contends that he was unlawfully detained and, as a result, the trial court should have suppressed evidence of the firearm. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. Facts Preceding Fonseca's Detention and Arrest[1]

On November 9, 2008, at approximately 5:45 p.m., Los Angeles County Deputy Sherriff Andrew Toone (Deputy Toone or Toone) and his partner were riding in a marked police car. During their patrol they observed a Hispanic male urinating against the wall of a gas station and simultaneously witnessed a car pull into a parking spot adjacent to the urinating man. As Deputy Toone and his partner drove into the gas station to confront the urinating man, five Hispanic males exited the adjacent car and walked toward the gas station. Toone believed that the group was affiliated with the individual who was urinating. When the five men saw Toone's police car approaching, they immediately turned around and re-entered their vehicle "as if they were startled by [the officers'] presence." Approximately 10 seconds passed from the time the group exited the car to the time they re-entered it.

Deputy Toone thought that the men's immediate re-entrance into their car "didn't seem normal." While his partner detained the man who was urinating, Toone drew his gun, which he held at his side pointing downward, and then approached the passenger side of the vehicle and watched the occupants. The front windows of the vehicle were down and Toone could see the driver and front passenger. Although Toone did not have a good view of the back seat of the car, he could see that the rear passengers were staring straight forward and that none of them were talking or making any gestures. Toone's

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[1] The undisputed material facts are taken from the transcript of the preliminary hearing.

partner, who had been detaining the urinator, eventually joined Toone near the parked vehicle.

Toone directed the occupants to place their hands in a visible spot and asked the driver whether he had a license. The driver stated that he did not.[2] As he questioned the driver, Toone noticed that the occupants in the vehicle would not make eye contact with him and appeared "nervous," "stiff" and "not relaxed." Toone removed the driver from the vehicle, conducted a pat down search of the driver and moved him into the squad car. Toone then went around the vehicle and "contacted" Fonseca, who was sitting in the passenger seat. Toone noticed a bulge in Fonseca's sweater that was "hanging down as if it was heavy" and "big enough to be a weapon." Concerned that the bulge was a weapon, Toone opened the passenger side door, grabbed Fonseca's right wrist and asked him to step out of the vehicle. Toone patted Fonseca down and discovered that the bulge was very solid. When Toone touched the bulge, Fonseca said that that he "'found that gun last night.'" Toone removed the item and discovered that it was a loaded .357 magnum.

B. Proceedings in the trial court

The District Attorney's office charged Fonseca with two counts: (1) possessing a concealed weapon in a vehicle (Pen. Code, § 12025, subd. (a)(1)), and (2) carrying a

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[2] The record is ambiguous as to whether Officer Toone directed the occupants to place their hands in a visible spot before or after Toone asked the driver whether he had a license. The trial court stated that Officer Toone instructed the occupants to make their hands visible shortly after he drew his gun, suggesting that his first contact with the driver occurred only after he directed the occupants to show their hands. In addition, the trial court determined that Toone detained Fonseca and his companions when he drew his weapon and told them to put their hands in a visible spot. However, when reciting the evidence that gave Officer Toone reasonable suspicion for the detention, the court did not mention that the driver had no license. This suggests that the trial court concluded that Toone asked for the license only after the detention occurred (i.e., after telling the occupants to put their hands in a visible position.) The People have not taken a position as to the order in which these events occurred. Because it appears that the trial court concluded that Toone detained Fonseca and his companions before he asked the driver for his license, and because "the prosecution has the burden of establishing a detention was lawful," (*People v. Stier* (2008) 168 Cal.App.4th 21, 27), we resolve this ambiguity in favor of the Appellant and assume that Toone contacted the driver only after directing the occupants to place their hands in a visible spot.

loaded firearm in public (Pen. Code, § 12031, subd. (a).) During the preliminary hearing, Fonseca moved to suppress the weapon, arguing that Toone did not have sufficient cause to detain Fonseca and the other occupants of the vehicle. Officer Toone was the sole witness at the hearing.

The trial court denied Fonseca's motion, concluding that Deputy Toone detained Fonseca and his companions the moment he drew his weapon, approached their car and directed them to place their hands in a visible position.[3] The court did not believe that the officers' observation of a man urinating near the adjacent vehicle provided any suspicion that Fonseca and his associates were engaged in criminal activity. It did find, however, that Officer Toone's "suspicions were reasonably aroused when he saw five people . . . leave the vehicle, look at him, then immediately get back in," reiterating that "when [Toone] sees people get out of a car, look at him, immediately get back in, I think it's reasonable for him to stop and do a short investigation to see what is going on." The court also "thought it was significant . . . [that] the deputy was aware that this was a high crime area." Finally, the court gave weight to the fact that, while approaching the driver, Toone noticed that the passengers "wouldn't make eye contact" and looked "nervous." Although the court ultimately denied Fonseca's motion, it conceded that "the law in this area is not crystal clear. There are cases which say somebody looks at the police and flees, they have a right to do that; is not really grounds to stop. [¶] There are other cases that say you have to look at all the circumstances. And someone who acts suspiciously around police vehicles, there are times when that is grounds to stop and see what they are up to."

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[3] Fonseca's attorney argued that "the seizure occurred as soon as Deputy Toone came within 6 feet of the door." The trial court, however, stated his belief that the seizure occurred even earlier, noting that Toone "pulled his gun out, even while the other deputy was over with the man who was urinating."

Following the preliminary hearing ruling, Fonseca filed a Penal Code section 995 motion to renew his motion to suppress. The court denied the motion[4] and Fonseca subsequently pled "no contest" to count 1.[5]

Fonseca now appeals from the order denying his motion to suppress evidence. (Pen. Code, § 1538.5, subd. (m).)

DISCUSSION

1. Standard of Review

An appellate court's review of a ruling on a motion to suppress is "governed by well-settled principles: We defer to the trial court's findings of fact that are supported by substantial evidence, but in all other respects the court's ruling is subject to independent review." (*People v. Britton* (2001) 91 Cal.App.4th 1112, 1118 [citing *People v. Ayala* (2000) 24 Cal.4th 243, 279].) Whether relevant evidence obtained by unlawful means must be excluded is determined exclusively by deciding whether its suppression is mandated by the federal Constitution. (Cal. Const., art I, § 28; *In re Randy G.* (2001) 26 Cal.4th 556, 561-562.)

2. The Trial Court Improperly Denied Fonseca's Motion to Suppress

a. The requirement of reasonable suspicion for a detention

In certain circumstances, a police officer may stop and briefly detain a person for questioning or other limited investigation. (*In re Tony C.* (1978) 21 Cal.3d 888, 892.) A detention occurs within the meaning of the Fourth Amendment when the officer, by means of physical force or show of authority, in some manner temporarily restrains the individual's liberty. (*People v. Zamudio* (2008) 43 Cal.4th 327, 341.) In this case the court ruled that Deputy Toone detained Fonseca and his companions when he approached their vehicle with his weapon drawn and directed them to place their hands in a visible

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[4] The judge denied the section 995 motion on essentially the same grounds relied on by the judge who denied the initial section 1538.5 motion to suppress.

[5] The District Attorney agreed to drop count 2.

spot. Neither the facts nor the court's conclusion regarding the moment of detention are disputed.

Deputy Toone's detention of Fonseca and the subsequent seizure of his weapon were valid only if Toone had a reasonable, articulable suspicion that Fonseca was involved in criminal activity at the moment Toone drew his weapon and approached Fonseca's vehicle. (*Terry v. Ohio* (1968) 392 U .S. 1, 21; *People v. Wells* (2006) 38 Cal.4th 1078, 1083.) "The officer's subjective suspicion must be objectively reasonable, and 'an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith.' [Citation.]" (*Wells*, *supra*, at p. 1083.) In evaluating whether the standard of objective reasonableness has been satisfied, we must examine the "totality of the circumstances" to determine whether a "particularized and objective basis" supports the detention. *(United States v. Cortez* (1981) 449 U.S. 411, 417.) "[A]n assessment of the whole picture must yield a particularized suspicion . . . that the particular individual being stopped is engaged in wrongdoing." (*Id.* at p. 418; see also *People v. Souza* (1994) 9 Cal.4th 224, 231 [officer must "point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity"].) Although an officer's reliance on a mere "'hunch' is insufficient to justify a stop, [citation], the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." (*United States v. Arvizu* (2002) 534 U.S. 266, 273-274.)

b. Deputy Toone's detention of Fonseca was not objectively reasonable

During his testimony, Toone described four general categories of information that caused him to draw his weapon, approach the vehicle in which Fonseca was seated and direct the occupants to place their hands in a visible position.[6] First, Deputy Toone

[6] Because the People have not disputed that the detention occurred when Toone drew his weapon and directed the occupants of the car to put their hands in a visible

thought that the individual urinating in front of a gas station was connected to Fonseca and his companions, who were sitting in an adjacent vehicle. Second, Toone witnessed Fonseca and his companions exit their car and then, upon seeing the police, immediately re-enter the vehicle. Third, Deputy Toone stated that, as he approached their vehicle, the occupants looked "nervous." Fourth, Deputy Toone knew that the gas station was located in a "high crime" area. We discuss each of these factors independently and then assess whether, when considered as a whole, the undisputed facts in this case established an objectively reasonable suspicion to detain Fonseca.

(i) Toone's observation of an individual urinating in public

Deputy Toone testified that he was initially drawn to the gas station because he witnessed a Hispanic man urinating in public. He further stated that he believed this individual might be affiliated with a group of Hispanic men sitting in a nearby vehicle. It is not obvious why Toone believed the urinating man was affiliated with Fonseca's group. During the preliminary hearing Toone never explained the basis for his belief. Moreover, he testified that as he was approaching the gas station he saw the individual urinating while the driver of the car was parking. If, as Deputy Toone's testimony suggests, the car was actually pulling into the gas station parking lot at the time the individual was urinating, it is difficult to understand why Toone would conclude that the two parties were connected.

In any event, it is apparent from Deputy Toone's testimony that although he was drawn to the scene when he saw the man urinating in public, this did not create any immediate suspicion that Fonseca and his associates were themselves engaged in criminal activity or somehow complicit in the public urination. Rather, as discussed in more detail below, Toone became suspicious only after he saw the group re-enter their car.[7] The trial

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position, we look only to the facts prior to that point to determine whether the detention was reasonable.

[7] During the preliminary hearing Toone stated that "my attention was drawn toward them because upon my presence, they exited the vehicle and then within seconds, all of them immediately walked back in . . . that didn't seem normal to me."

court agreed with this assessment, stating that "[i]nitially the deputies thought the person who urinated came out of the vehicle. That would not really be grounds to stop the vehicle since [no]body else in the vehicle was committing the crime at that point." We agree with the trial court's conclusion. (C. f., *People v. Gallant* (1990) 225 Cal.App.3d 200, 207-208 ["While [the arresting officers] reasonably suspected criminal activity at the residence . . . there were no 'specific and articulable facts' which could justify the suspicion that defendant was involved in that activity"].)

(ii) Exit and re-entry into the vehicle

The transcript makes clear that the critical factor leading to the detention in this case was Deputy Toone's observation that Fonseca and his companions exited their vehicle and then, upon seeing the police, abruptly re-entered it. Indeed, Toone specifically testified that he initially drew his weapon and approached the vehicle because "the way that the male Hispanics exited the car, then upon my presence immediately turned around got back into it, their actions made me nervous."[8] The implication of Toone's testimony is that Toone believed Fonseca and his group were attempting to avoid contact with the officers.

The extent to which an individual's avoidance of police contact may be considered in establishing reasonable suspicion has generated a significant amount of discussion in Fourth Amendment jurisprudence. The California Supreme Court has observed that "an individual is free to avoid contact with a police officer . . . '[t]o hold that the mere exercise of this liberty justifies a detention would be tantamount to holding that an officer may insist upon an encounter without adequate cause.' [Citation.]" (*Souza, supra,* 9 Cal.4th at p. 234; see also *People v. Bower* (1979) 24 Cal.3d 638, 648 [an "individual, unless he or she is properly detained and so notified, is as free to avoid the officer as to avoid any other person"].) Similarly, the United States Supreme Court has held that a

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[8] Toone later re-iterated this point, stating that "Because of their reaction to my presence, I felt uncomfortable with it . . . [and I] stood next to the vehicle they were all sitting in" and "watched them with my weapon drawn."

person approached by police for questioning "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. [¶] He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." (*Florida v. Royer* (1983) 460 U.S. 491, 498.)

The case law also makes clear, however, that "the *manner* in which a person avoids police contact" may rightly be considered "by police officers in the field or by courts assessing reasonable cause for briefly detaining the person." (*Souza, supra*, 9 Cal.4th at p. 234.) As explained by our Supreme Court, "[t]here is an appreciable difference between declining to answer a police officer's questions during a street encounter and fleeing at the first sight of a uniformed police officer. Because the latter shows not only unwillingness to partake in questioning but also unwillingness to be observed and possibly identified, it is a much stronger indicator of consciousness of guilt." (*Id.* at pp. 234-235; see also, *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 ["[h]eadlong flight – wherever it occurs – is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such"].) Courts have declined to establish any bright-line test regarding the assessment of police avoidance in the context of temporary detentions. (See *Souza, supra*, 9 Cal.4th at pp. 235-39 [rejecting Attorney General's request for bright-line rule]; *Wardlow, supra*, 528 U.S. at p. 126 [conc. & dis. opn. of Stevens, J.] [noting majority's rejection of bright-line rule when assessing flight]; *United States v. Jordan* (5th Cir. 2000) 232 F.3d 447, 449 ["*Wardlow* did not establish a bright-line test in cases where a defendant is seen to be running"].) Rather, like other factors relevant to the reasonable suspicion standard, the overall significance of an individual's decision to avoid police contact must be weighed by looking to "'the totality of the circumstances – the whole picture.'" (*Souza, supra*, 9 Cal.4th at p. 239; *Cortez, supra*, 449 U.S. at p. 417; *United States v. Sokolow* (1989) 490 U.S. 1, 7-8.)

When the surrounding circumstances are considered as a whole, there is little to suggest Fonseca and his companions' re-entrance into their automobile met the relevant

test. First, unlike most cases in which courts have deemed police avoidance to constitute evidence of criminal activity, Fonseca and his compatriots did not actually engage in any "flight." (Compare *Souza, supra*, 9 Cal.4th at p. 240 [when officer "directed his patrol car's spotlight into the car's interior. . . defendant took off running"]; *Wardlow, supra*, 528 U.S. at p. 124 ["Headlong flight . . . is the consummate act of evasion"], with *People v. Perrusquia* (2007) 150 Cal.App.4th 228, 234 [although defendant attempted to avoid police, no reasonable suspicion existed because "[t]here were no immediately highly suspicious facts such as the flight of a defendant's . . . companions"].) Rather, according to Deputy Toone's testimony, when the officers approached the scene the men simply turned around, returned to the car and remained there as the police apprehended the public urinator. Nor does it appear that the men returned to the car in great haste. Although Toone suggested their re-entry was sudden, he also stated that 10 seconds passed between the time they exited and re-entered the vehicle. Thus, it cannot be said that the passengers demonstrated an "unwillingness to be observed and possibly identified." (*Souza, supra*, 9 Cal.4th at p. 234-235 [explaining that "flight," as opposed to mere police avoidance, is indicative of wrongdoing because it shows an unwillingness to be observed or identified].)

Second, and again, unlike most cases where a suspect's police avoidance has been deemed to be suspicious, the events here occurred at a normal hour (5:45 p.m.) and in an area where people might be expected to congregate: the parking lot of a gas station that was apparently open for business. (Compare *Bower, supra*, 24 Cal.3d at p. 645 ["the time at which the detention occurred (8:37 p.m.), while falling during darkness in winter, is simply not a late or unusual hour nor one from which any inference of criminality may be drawn"]; *Perrusquia, supra*, 150 Cal.App.4th at p. 234 ["[u]nlike several of the cases cited by the district attorney, here, the hour was not particularly late, and the store was, apparently open"], with *Souza, supra*, 9 Cal.4th at p. 240 [finding reasonable suspicion where a defendant fled officers at 3:00 a.m. "in total darkness"]; *People v. Holloway* (1985) 176 Cal.App.3d 150 [upholding detention where suspects fled police in residential neighborhood at 2:58 a.m.].) Moreover, the lighting was good, the front windows were

down and Toone could see that the occupants of the car were not making any furtive movements or gestures.

Third, it is significant that Fonseca and his companions returned to their car while Toone's partner was detaining and arresting another man. There is nothing abnormal or suspicious about trying to avoid a scene while the arrest of another party is occurring. (See *Wardlow*, *supra*, 528 U.S. at p. 131 [conc. & dis. opn. of Stevens, J.] ["where there is criminal activity there is also a substantial element of danger-either from the criminal or from a confrontation between the criminal and the police. These considerations can lead to an innocent and understandable desire to quit the vicinity with all speed"].)

Given the manner in which these five men returned to their car and all the surrounding circumstances, their decision to re-enter the automobile does not support a suspicion that they were engaging in criminal activity. Indeed, if the conduct at issue did constitute evidence of criminal activity, it is difficult to comprehend how anyone could exercise their right to avoid police contact without providing reasonable suspicion to justify detention. (See *Bower*, *supra*, 24 Cal.3d at p. 649 ["If the right to be free from unjustified detentions is lost merely by seeking to avoid such encounters, then the right is meaningless, it would exist only to the extent it was not exercised."]; *Perrusquia*, *supra*, 150 Cal.App.4th at p. 236 [conc. opn. of O'Leary, J.] [noting that, if exiting vehicle and walking by police officer at a brisk pace may be treated as evidence of criminal activity, it would be difficult to "exercise one's right to decline a conversation with a police officer without assisting the officer in establishing reasonable suspicion"].)

(iii) Fonseca and his companions appeared " nervous"

Another factor that Deputy Toone relied on to justify the detention was that Fonseca and his companions looked "nervous." More specifically, Toone explained that Fonseca and his companions "wouldn't make eye contact with me," "were not relaxed" and "look[ed] straight forward, not saying a word."

In certain circumstances, nervous behavior may be a "pertinent factor in determining reasonable suspicion." (*Wardlow*, *supra*, 528 U.S. at p. 124.) The California Supreme Court has cautioned, however, that

> Nervousness in the presence of a police officer does not furnish a reasonable basis for a detention, especially where . . . it "could understandably result from police questioning because of a 'traffic violation.'" . . . "[T]o hold that police officers should in the proper discharge of their duties detain and question all those who act nervous at the approach of officers would for practical purposes involve an abrogation of the rule requiring substantial circumstances to justify the detention and questioning of persons on the street.

(*People v. Loewen* (1983) 35 Cal.3d 117, 125; see also *People v. Dickey* (1994) 21 Cal.App.4th 952, 954 [fact that defendant did not have identification, refused to consent to a search and was "nervous and sweating" did not justify detention].) The Court has also held that, in many cases, an individual's refusal to make eye contact with law enforcement does not constitute suspicious behavior. For example, in *People v. Loewen*, (1983) 35 Cal.3d 117, an officer testified that one of the reasons he detained the defendant was because the defendant and his companion "looked away" when they drove by the officer. The officer further testified that "their failure to continue looking at him was suspicious because '[m]ost people have a habit of looking at a patrol car when they pass it.'" (*Id.* at. p. 126.) The Court found that there was nothing suspicious about the defendant's behavior, noting that "'"[t]here are many reasons other than guilt . . .why"' drivers and passengers of vehicles who fail to fix their vision on a uniformed officer conducting what appears to be a routine traffic investigation alongside a local highway. A contrary rule would lead to the characterization of most innocent behavior as criminal." (*Ibid.*; see also *People v. Carlson* (1986) 187 Cal.App.3d Supp. 6, 24 ["In many cases, refusal to make eye contact has been expressly rejected as a 'probable cause' factor"].) The Court went on to rule that the defendant's failure to make eye contact with the officer was "without consequence," emphasizing that the officer "admitted that neither occupant ducked, hid his face from the officer's view, or made any other 'suspicious' movements. There was no evidence that anything 'was being concealed, disposed of, exchanged, or even carried.'" (*Loewen, supra,* 35 Cal.3d at p. 127.)

We believe that, under the facts presented here, the "nervous" behavior described by Deputy Toone did not support a suspicion that the defendant was engaged in criminal

activity. As explained, above, Fonseca and his companions had re-entered their vehicle outside a retail business in the middle of the day. While Officer Toone approached the vehicle with his weapon draw, the occupants stared straight ahead and remained silent. As in *Loewen*, they did not make any effort to hide their faces from view or make any suspicious gestures. Nor was there any evidence that the occupants were sweating, jittery fidgety or manifesting any other obvious signs of "nervousness." (See, e.g, *In re H.M.* (2008) 167 Cal.App.4th 136, 144 [officer's suspicions were reinforced because defendant was "sweating profusely and appeared confused and nervous"].) Although Toone testified that the occupants appeared "stiff" and "not relaxed," our Supreme Court has explained that, in most cases, drivers and passengers of vehicles will understandably exhibit some signs of nervousness when approached by a police officer. (*Loewen, supra,* 35 Cal.3d at p. 125.) In sum, we do not believe that remaining quiet and avoiding eye contact was an abnormal response to an officer who was advancing with his weapon drawn, nor do we believe such behavior established a reasonable suspicion that Fonseca and his companions were engaged in criminal activity.

(iv) High Crime Area

Toone also testified that his suspicions regarding Fonseca's group were heightened because he knew that the gas station was located in "a high crime area." In the particular circumstances of this case, however, we conclude that the "high crime factor" is of little evidentiary value.

Although "[a]n area's reputation for criminal activity is an appropriate consideration in assessing whether an investigative detention is reasonable under the Fourth Amendment" (*Souza, supra,* 9 Cal.4th at p. 240), this factor "'should be apprised with caution' . . . . [Courts should be] reluctant to conclude that a location's crime rate transforms otherwise innocent-appearing circumstances into circumstances justifying the seizure of an individual."[9] (*Bower, supra,* 24 Cal.3d at p. 645.)

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[9] There are multiple reasons for applying this factor with caution. First, "[t]he' high crime area' justification is easily subject to abuse. [Citation.]" (*Bower, supra,* 24 Cal.3d at p. 645.) Second, "courts and law enforcement must be careful not to tar people with

The Supreme Court has been particularly skeptical of the high crime justification in situations where the District Attorney fails to provide testimony "'as to how the allegedly suspicious activity [was] related to the type of activity upon which that crime rate estimate [was] based.'" (*Loewen, supra*, 35 Cal.3d at pp. 124-125 [quoting *Bower, supra,* 24 Cal.3d at p. 646, fn. 8].) Stated differently, the high crime justification is of limited persuasive value without some nexus between the observed conduct and the type of activity that qualifies the area as a high crime region. (See, e.g., *People v. Huntsman* (1984) 152 Cal.App.3d 1073, 1090 [discounting "high crime" factor where "the causal link between prostitution in the area and contraband in the automobile's trunk was never supplied by the officer's testimony"].)

At the preliminary hearing, Toone stated only that the gas station was located in "a borderline of . . . two gang areas" and that, during the past four years, he had investigated a homicide and made numerous narcotics arrests in the surrounding area. Toone did not state that this particular gas station had been a target of heightened criminal activity nor did he explain how or why the passengers' conduct – getting in and out of a car at a normal hour in front of an open business – was suggestive of illegal gang or narcotic activity.

(v.) When considered as a whole, the facts do not establish reasonable suspicion

The relevant facts that preceded Deputy Toone's detention of Fonseca are as follows: while investigating a person urinating in public in a high crime area, Deputy Toone observed a group of men parked in a nearby car exit their vehicle and then re-enter it as the police approached. As the officer approached the vehicle with his weapon drawn, the occupants looked straight ahead and remained silent. When considered as a whole, we do not believe these facts established a reasonable, articulable suspicion

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the sins of their neighbors." (*United States v. Montero-Camargo* (9th Cir. 2000) 208 F.3d 1122, 1139, fn. 32.) Unfortunately, "[m]any citizens of this state are forced to live in areas that have 'high crime' rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas." (*Bower, supra*, 24 Cal.3d at p. 645.)

Fonseca and his companions were involved in criminal activity. Toone's testimony indicates that the officers' observance of a man urinating in public provided little suspicion that Fonseca or his associates were themselves involved in any criminal activity. This leaves only the fact that, in a high crime area, five men exited a vehicle, quickly re-entered it after Toone pulled into the gas station, and then remained quiet and stared forward while Toone approached the car with his weapon drawn. As explained above, under the circumstances presented here, even if we assume that re-entry into a vehicle constitutes police avoidance, Fonseca and his companions did not exhibit the traditional characteristics of "flight" that are indicative of guilt. Moreover, the men were in front of a public business during routine business hours. Nor do we believe that remaining silent and staring straight forward was a suspicious response to an officer who was approaching with a drawn weapon. Finally, Toone's general description of the relevant location as a "high" crime area was insufficient to transform the groups' conduct into something nefarious.

Other courts have found reasonable suspicion lacking under analogous circumstances. For example, in *People v. Perrusquia*, *supra*, 150 Cal.App.4th 228, a California Court of Appeal reviewed the propriety of a detention that occurred in front of a chain of stores that had been subjected to recent burglaries. The officers observed a man parked in a car near the exit (rather than the entrance) of the store. The man, who roughly fit the description of the burglary suspect, was crouched low in the car and leaning against the interior window in a "suspicious" manner. (*Id*. at p. 231.) As the officers approached the car they heard "'kind of like a fumbling'" and then heard what they believed to be something dropping to the car floor. (*Ibid*.) After the defendant saw the approaching officers, the defendant turned off the car, exited the vehicle and "'aggressively, quickly' tried to pass" the officers, which the officers interpreted as an attempt to avoid police contact. (*Id*. at pp. 231, 234.) When the officers asked what was going on, the defendant said he was going to the store. The officers subsequently detained him. The reviewing court concluded that those facts did not constitute reasonable suspicion, explaining "the hour was not particularly late, and the store was,

apparently, open. [Citations.] There were no immediately highly suspicious facts such as the flight of a defendant's . . . companions." (*Id*. at p. 234.) The circumstances in our case are no more suspicious than those in *Perrusquia* and the same outcome is warranted.

In *People v. Bower*, 24 Cal.3d 638 [abrogated on other grounds by Constitutional amendment] [*see People v. Lloyd* (1992) 4 Cal.App.4th 724, 732-733]),[10] the Supreme Court also reviewed a similar set of facts and ruled that a detention was unjustified. The officers in *Bower* were patrolling a residential neighborhood that was known to be a "high crime area." At approximately 8:30 p.m., the officers saw a group of people exit an elevator and approach the parking lot where the patrol car was located. When the group looked in the direction of the police car, they stopped, immediately turned around, and went back to the elevator, which had closed. (*Id*. at p. 642.) The individuals then returned to the stairway, "'formed a huddle of some sort'" and began conversing with one another. Shortly thereafter, one member of the group "started moving hurriedly away from the group while looking back over his shoulder toward the police car." (*Ibid*.) The officers walked toward the remaining members of the group and they immediately "'fragmented.'" An officer trailed one of the individuals who "proceed[ed] at a 'very quick walk, almost a run'" toward a nearby street. (*Id*. at p. 643.) The officer subsequently searched the man and found a weapon. The court ruled that the groups' apparent attempt to avoid the officers was insufficient to justify the detention, emphasizing that an "individual . . . is as free to avoid the officer as to avoid any other person." (*Id*. at p. 648) The court also ruled that the "high crime" nature of the surrounding area and the nighttime hour (8:37 p.m.) did not provide sufficient, additional evidence of suspicion to meet the relevant test. The similarities between *Bower* and this

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[10] *Bower* was decided before California passed Proposition 8, which permitted exclusion of evidence only if the exclusion was required by the United States Constitution. However, California courts, including the Supreme Court, have continued to cite and discuss *Bower* with approval. (See, e.g., *Souza, supra,* 9 Cal.4th at p. 234; *In re Manuel G.* (1997) 16 Cal.4th 805, 823-824; *People v. Medina* (2003) 110 Cal.App.4th 171, 177.)

case are obvious – both involve a group of people in a high crime area who, at a reasonable hour in the day, did nothing more than try to avoid police contact.

In contrast to *Perrusquia* and *Bower*, which support a reversal in this case, the People have not identified any decision upholding detention "where the facts are . . . as thin and nonspecific as they are here." (*Perrusquia*, *supra*, 150 Cal.App.4th at p. 234.) Moreover, the People's brief does not discuss the specific facts of *any* case in which a court approved a detention under similar circumstances. We find this omission telling.

In sum, Deputy Toone's experience and instincts warned him something was amiss with the five men in the parked automobile. His decision to investigate further and to protect himself and his partner while doing so was, in many respects, excellent police work. However, despite maintaining a good faith suspicion that Fonseca and the other passengers in the car may have been about to engage in some sort of criminal activity, Toone was not justified in detaining the men when he did. As our colleagues in Division One of the Fourth Appellate District explained several years ago in a similar context, "'A hunch may provide the basis for solid police work; it may trigger an investigation that uncovers facts that establish reasonable suspicion, probable cause, or even grounds for a conviction. A hunch, however, is not a substitute for the necessary specific, articulable facts required to justify a Fourth Amendment intrusion.'" (*People v. Pitts* (2004) 117 Cal.App.4th 881, 889.) "[T]his is why police work is difficult, complex and challenging[, and] it's difficult from a moral or practical standpoint to criticize the officers." (*Perrusquia, supra*, 150 Cal.App.4th at p. 234.) Because the facts in this case did not meet the legal standard for a detention, we must reverse.

DISPOSITION

The judgment of conviction is reversed. On remand the trial court is directed to vacate its order denying Fonseca's motion to suppress evidence and to enter a new order granting the motion. The trial court is further directed to permit Fonseca to withdraw his plea of no contest within 30 days after issuance of the remittitur. If Fonseca does not move to withdraw his plea within that time, the judgment of conviction shall be reinstated.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.